DA 19-0738

IN THE SUPREME COURT OF THE STATE OF MONTANA

2022 MT 10

STATE OF MONTANA,

Plaintiff and Appellee,

v.

AMBER MARIE BURNETT,

Defendant and Appellant.

APPEAL FROM: District Court of the Eighth Judicial District,
In and For the County of Cascade, Cause No. DDC 18-241
Honorable Robert G. Olson, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Chad Wright, Appellate Defender, Kathryn Hutchison, Assistant Appellate Defender, Helena, Montana

For Appellee:

Austin Knudsen, Montana Attorney General, Katie F. Schulz, Assistant Attorney General, Helena, Montana

Joshua Racki, Cascade County Attorney, Jennifer Quick, Deputy County Attorney, Great Falls, Montana

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Submitted on Briefs: January 12, 2022

Decided: January 18, 2022

Filed:

Clerk

Justice Laurie McKinnon delivered the Opinion of the Court.

¶1 Following a two-day bench trial in the Eighth Judicial District Court, Cascade County, Amber Marie Burnett was convicted of nine counts of assault on a minor, in violation of §§ 45-5-212 and 45-5-201, MCA, and one count of perjury, in violation of § 45-7-201(1), MCA. We affirm and restate the issues on appeal as follows:

1. *Whether the delay in bringing Burnett to trial violated her constitutional right to a speedy trial.*

2. *Whether sufficient evidence existed to support Burnett's conviction for perjury.*

FACTUAL AND PROCEDURAL BACKGROUND

¶2 In the fall of 2017, Nicholas Conlan, a high school friend of Burnett's, moved in with Burnett, her boyfriend, and her children, A.G. and N.G. With Burnett's permission, Conlan installed a video surveillance system in the home. The cameras were set to run constantly before Conlan adjusted them to activate when motion was detected. During the four months Conlan lived with Burnett, he witnessed Burnett verbally and physically abuse the children on several occasions. On one notable instance, Conlan testified that Burnett asked him for his taser. Conlan believed Burnett intended to scare N.G. Conlan further testified to witnessing Burnett use the taser on N.G. for three seconds in his bedroom.[1] This incident was not recorded. Burnett evicted Conlan in early 2018 after he confronted her about the abuse. Conlan did not report his concerns to law enforcement.

¶3 A few weeks after Conlan moved out, Child and Family Services (CFS) received a report of suspicious bruising on A.G. and N.G. CFS contacted the Great Falls Police

[1] This incident later served as the basis for Count I of the State's first amended Information.

Department (GFPD) to investigate further after observing bruises on the children. Burnett told GFPD Officer Jon Marshall the children's bruises resulted from getting struck by a snowball and from playing with the family's dog. Officer Marshall did not believe the bruises came from the dog, and he observed the kids' demeanor change when he asked them about the bruises, raising his suspicions.

¶4 As a result of these suspicions, CFS removed the children. GFPD Detective Katie Cunningham was assigned to investigate. Detective Cunningham interviewed Burnett and collected her cell phone. Detective Cunningham also spoke to Conlan in early April. Conlan provided the taser and surveillance system hard drive. Detective Cunningham later testified to the voluminous nature of the footage, which spanned several months of continuous recording. Based on Detective Cunningham's initial review, the State charged Burnett by Information with two felony counts of assault on a minor, in violation of § 45-5-212, MCA, and two misdemeanor counts of endangering the welfare of a child, in violation of § 45-5-622(1), MCA, on April 26, 2018. Citing the severity and nature of the charges, the State arrested Burnett the same day. During a jailhouse phone call, Burnett and her father discussed the charges against her. Burnett admitted she held the taser to N.G. but stated she did not activate it. Burnett did not specify which part of the taser she held to N.G.

¶5 Burnett bonded out of jail on May 5, 2018, and first asserted her right to a speedy trial on May 7. Burnett was arraigned on May 18, 2018, and filed a motion to continue the omnibus deadline on May 30, stating that additional law enforcement reports and surveillance footage would soon be disclosed and require substantial time to review.

Burnett filed two additional motions to continue, ultimately pushing the omnibus deadline to September 28, 2018. Burnett's first trial was subsequently scheduled for March 18, 2019. In October 2018, the State offered Burnett a plea agreement, agreeing not to charge additional counts if Burnett pled guilty. Burnett filed a notice of substitution of counsel on December 10, 2018, and her new defense counsel met with the State to review the surveillance footage. During this period, Detective Cunningham ceased review of the footage, reflecting the State's belief the case would settle. The State modified its offer in February 2019, agreeing to accept a nolo contendre plea from Burnett.

¶6 Plea negotiations fell through in March 2019, and the State filed a motion to continue Burnett's trial on March 8, 2019, citing the need to finalize the investigation and prepare for trial. Burnett did not object to the State's request. Based on the availability of the State and defense counsel and the court's docket, the District Court reset Burnett's trial for August 5, 2019. Detective Cunningham resumed her review of the surveillance footage. On April 3, 2019, Burnett filed a motion to dismiss due to a violation of her speedy trial rights, which the State opposed. The District Court held a hearing on the motion on June 10, 2019. Detective Cunningham's review prompted the State to file an Amended Information the same day, charging Burnett with fourteen counts of felony assault on a minor, two counts of misdemeanor endangering the welfare of a child, and one count of felony perjury.

¶7 The District Court issued its findings of fact, conclusions of law, and order denying Burnett's motion to dismiss on July 24, 2019. The District Court concluded the 466-day delay between Burnett's arrest and trial on August 5, 2019, surpassed the 200-day threshold

set forth in *State v. Ariegwe*, 2007 MT 204, 338 Mont. 442, 167 P.3d 815, and thus triggered further analysis. The District Court concluded the reasons for the delay were attributable to the State but were institutional in nature and thus weighed least heavily. The District Court further concluded Burnett's response to the delay weighed against her and that Burnett had not been prejudiced by the delay. Based on this analysis, the District Court denied Burnett's motion and the case proceeded to a bench trial on August 5.

¶8 At trial, the State presented testimony from Officer Marshall, A.G.'s teacher, the counselor at A.G. and N.G.'s school, Conlan, Detective Cunningham, the nurse who examined the bruises on A.G., and an employee at a daycare center near Burnett's home. Burnett testified on her own behalf. Regarding the other incidents, Burnett did not dispute the video footage or her actions but testified she believed the incidents constituted appropriate parental discipline within her parental rights. On cross-examination, she categorized the videos as a misunderstanding caused by Conlan. The taser incident, which also served as the basis for the perjury charge, is discussed below.

Perjury Conviction

¶9 The State's Amended Information included one count of felony perjury, in violation of § 45-7-201(1), MCA. The State alleged Burnett perjured herself during the corresponding dependency and neglect (DN) proceeding by testifying she never used a taser on her children and by denying making a statement to her father about the taser during a jailhouse call.

¶10 During the DN proceeding, Burnett denied abusing her children and provided the following relevant testimony:

[Defense counsel]: All right. Let's start with the taser. Did you use a taser on the children?

[Burnett]: No, sir.

[Defense counsel]: Did you make a statement that you had used a taser on the children?

[Burnett]: No, sir.

[Defense counsel]: Did you ever press a taser against one of your children?

[Burnett]: No, sir.

[Defense counsel]: Okay. Didn't do anything like that?

[Burnett]: No. The -- my question is, no one asked and described the taser in court, what it looks like, or how it was described. I can describe that taser. It has a red button and a black button. On one end of the taser is a taser. The other end is a flashlight. No one thought to bring that up, so I would like to bring that up on the record.

[Defense counsel]: Okay. Did you ever threaten any of the children with a taser?

[Burnett]: No.

[Defense counsel]: Did you make any statement on the jail phones that you had threatened the children with a taser?

[Burnett]: No, sir.

[Defense counsel]: Okay. So, all that is not true-

[Burnett] Correct.

. . .

[State]: Okay. Isn't it true you told somebody that you put the taser up to your child, but you didn't pull the trigger?

[Burnett]: In jail, when you're being slandered all over the news, and you're - -

[State]: I asked you the question. The question is: Did you say that?

[Burnett]: Talked to my father about it, yes, I did. But I was requesting about the news media, because nothing was informed to me, what was being said.

¶11 At trial, the State introduced the recording of Burnett's phone call with her father through Detective Cunningham. On the recording, Burnett admitted to holding the taser on N.G. briefly without activating it. The District Court also admitted Burnett's testimony from the DN proceeding over defense counsel's objection. At trial, Burnett testified on her own behalf and provided the following relevant testimony concerning the taser:

[Counsel]: Okay. Did you ever press the taser against one of your children?

[Burnett]: No.

[Counsel]: Did you ever press part of the taser device against one of your children?

[Burnett]: Yes.

[Counsel]: Okay. Which part?

[Burnett]: The flashlight.

. . .

[Counsel]: Why did you do it?

[Burnett]: Nicholas threatened my family.

. . .

[Counsel]: How so?

[Burnett]: Nicholas Conlan got really upset with my daughter for stealing something of his.

. . .

[Counsel]: Okay. So how does this lead to you pressing the taser against your child?

[Burnett]: Nicholas turned around and used me at a most vulnerable time when I was medicated in agony pain.

Burnett further testified she understood her earlier testimony and did not intend to deceive with her answers, but indicated she understood the questions as asking whether she took the taser and discharged it on N.G. On cross-examination, Burnett testified that she understood pressing a taser against N.G. would cause fear but stated she did so to protect N.G. from Conlan. Burnett admitted she had not disclosed the allegation that Conlan threatened her into tasing N.G. Burnett provided the following additional relevant testimony:

[State]: Okay. And you say it was a misunderstanding, it was the flashlight end of the taser. You certainly didn't say that during the jail call with your father when he was shocked that you held it to her, did you?

[Burnett]: No, I did not. But there was a lot of phone calls made between me and my father.

[State]: Okay. Ms. Burnett, you understand you're under oath?

[Burnett]: Yes, I do.

[State]: At any time during any of those phone calls, did you indicate it was the flashlight end of that taser?

[Burnett]: Yes, I did.

[State]: You realize that those are in evidence?

[Burnett]: Yes, because my father brought it to my attention.

[State]: Okay.

[Burnett]: And I said it was a flashlight.

[State]: All right. At any time during your testimony under oath, did you indicate that you held the flashlight end of the taser to [N.G.]?

[Burnett]: Did I indicate it? No, I did not.

[State]: Okay. You actually denied the taser incident.

[Burnett]: Yes, because it didn't happen. You all are sitting here questioning me: Did I tase my child? You're sitting here asking me -- drilling me like many others after I was arrested. Sworn testimony of Nicholas Conlan that I tased my child.

[State]: Actually, the question, Amber, was: Did you ever press a taser against one of your children?

[Burnett]: No, I did not.

[State]: You never held the flashlight end to the child.

[Burnett]: Holding it and acting on it is different.

[State]: And you were asked: 'Did you ever threaten any of the children with the taser?' To which you responded: 'No.'

[Burnett]: Exactly.

[State]: 'Did you make any statements on the jail phone calls that you threatened the children with taser?' And you said: 'No.'

[Burnett]: Correct.

¶12 The District Court issued its findings of fact, conclusions of law, and judgment on September 13, 2019, wherein it found Burnett guilty of nine counts of assault on a minor and one count of perjury.[2] Concerning the taser incident, the District Court found that

[2] The District Court erroneously included guilty verdicts for two additional counts and subsequently issued amended findings on December 26, 2019.

Conlan testified to witnessing Burnett tase N.G. for three seconds. The District Court further found that Burnett testified she held the flashlight end of the taser to N.G. but never pressed the button to tase her. Based on these findings, the District Court acquitted Burnett of Count I, concluding "while the Court may believe that Burnette (sic) used a taser on N.G., the evidence presented at trial was insufficient to constitute proof beyond a reasonable doubt." While acquitting Burnett of Count I, the District Court concluded the State had met its burden of proving Burnett perjured herself when she denied pressing a taser against N.G. during the DN proceeding.[3]

¶13 At Burnett's sentencing hearing, the District Court imposed a net sentence of twenty years to the Department of Corrections with fifteen years suspended. Burnett appeals.

STANDARDS OF REVIEW

¶14 We apply two standards of review when reviewing a trial court's ruling on a speedy trial motion. *State v. Zimmerman*, 2014 MT 173, ¶ 11, 375 Mont. 374, 328 P.3d 1132. First, we review the factual findings underlying the court's ruling to determine whether those findings are clearly erroneous. *Zimmerman*, ¶ 11. Second, a speedy trial violation presents a question of constitutional law. *Ariegwe*, ¶ 119. As such, we review a trial court's conclusions of law de novo to determine whether the lower court correctly interpreted and applied the law. *Ariegwe*, ¶ 119.

[3] The District Court also concluded Burnett's testimony denying knowledge of the video cameras in her home constituted perjury. The State did not allege this testimony in its Amended Information and concedes on appeal this testimony was not the basis of Burnett's perjury charge. Accordingly, our analysis below focuses on whether Burnett perjured herself as to the use of the taser.

¶15 We review claims of insufficient evidence de novo. *State v. Fleming*, 2019 MT 237, ¶ 9, 397 Mont. 345, 449 P.3d 1234. When reviewing whether sufficient evidence exists to support a verdict, we view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. *Fleming*, ¶ 12. It is the factfinder's role to evaluate the credibility of witnesses, weigh the evidence, and ultimately determine which version of events should prevail. *State v. Bekemans*, 2013 MT 11, ¶ 20, 368 Mont. 235, 293 P.3d 843. Accordingly, whether the evidence could have supported a different result proves immaterial to our review. *State v. Weigand*, 2005 MT 201, ¶ 7, 328 Mont. 198, 119 P.3d 74.

DISCUSSION

¶16 *1. Whether the delay in bringing Burnett to trial violated her constitutional right to a speedy trial.*

¶17 A criminal defendant's right to a speedy trial is a fundamental constitutional right guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article II, Section 24 of the Montana Constitution. *State v. Stops*, 2013 MT 131, ¶ 18, 370 Mont. 226, 301 P.3d 811. The right to a speedy trial remains relative and depends on the circumstances of the case. *Zimmerman*, ¶ 12. A speedy trial claim necessitates analyzing and balancing the following four factors set forth in *Ariegwe*: (1) the length of the delay, (2) the reasons for the delay, (3) the accused's responses to the delay, and (4) prejudice to the accused. *Ariegwe*, ¶ 34. No one factor is dispositive; the factors are

related and must be assessed together with other relevant circumstances. *Ariegwe*, ¶ 112. Each factor's significance varies from case to case. *Ariegwe*, ¶ 105.

Factor One: the length of the delay

¶18 The threshold inquiry to trigger further speedy trial analysis remains whether the interval between accusation and the scheduled trial date is at least 200 days. *Ariegwe*, ¶ 107. The Information against Burnett was filed on April 25, 2018, and she was arrested the following day. Her trial began on August 5, 2019, an interval of 466 days.

¶19 Our analysis next considers the extent to which the delay, regardless of fault, stretches beyond the trigger date. *Ariegwe*, ¶ 107. "[T]he further the delay stretches beyond the trigger date, the stronger the presumption is under Factor Four that the accused has been prejudiced . . . and the heavier the State's burden is under Factor Two to provide valid justifications for the delay." *Zimmerman*, ¶ 14.

¶20 The delay between Burnett's Information and trial stretched 266 days beyond the trigger date. The District Court correctly concluded this delay substantially increased the State's burdens to explain the delay under Factor Two and to demonstrate Burnett was not prejudiced under Factor Four. Likewise, the presumption that Burnett was prejudiced intensified and her burden under Factor Four substantially decreased.

Factor Two: the reasons for the delay

¶21 Under Factor Two, we first identify each period of delay in bringing the accused to trial. *Ariegwe*, ¶ 63. "Often, the periods of delay will correspond with the different trial settings." *Zimmerman*, ¶ 15. We are not concerned with actions or events that did not result in a delay of the trial. *State v. Couture*, 2010 MT 201, ¶ 71, 357 Mont. 398,

240 P.3d 987. Second, after identifying each period of delay, we assign the delay to the responsible party. *Couture*, ¶ 71. The State bears the burden of explaining pretrial delays, and any delay not caused by or affirmatively waived by the accused is attributed to the State. *Zimmerman*, ¶ 15. Finally, after identifying and assigning each period of delay, we assign weight to each delay based on the specific cause and motive for the delay. *Ariegwe*, ¶ 67.

¶22 We have identified four reasons for delay along with a corresponding scale of culpability. Delay caused by the prosecution in bad faith, such as a deliberate attempt to impair the defense, weighs heavily against the State. *Zimmerman*, ¶ 19. Delay caused by negligence or lack of diligence falls in the middle, though "it still falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it has begun." *Ariegwe*, ¶ 69 (citations omitted). Institutional delay, or delay inherent in the criminal justice system and caused by circumstances largely beyond the control of the prosecutor and the accused, is attributable to the State but weighs less heavily than delay caused by bad faith, negligence, or lack of diligence. *Couture*, ¶ 72. Finally, "valid" reasons for delay, such as a missing witness, are weighed least heavily against the State. *Ariegwe*, ¶ 70. Delays caused by the accused are classified under a similar approach. *Couture*, ¶ 72.

¶23 The District Court identified the following two periods of delay: (1) a 326-day delay after the Information was filed on April 25, 2018, to Burnett's first trial setting on

March 18, 2019; and (2) a 140-day delay between the first trial setting on March 18, 2019, and Burnett's second trial setting on August 5, 2019.[4]

First delay: 326 days (April 26, 2018 to March 18, 2019)

¶24 The District Court classified the first delay of 326 days as institutional and inherent to a complex criminal case and thus weighed less heavily against the State. Burnett contends the District Court correctly identified the final 171 days of this delay as institutional but should have weighed the first 155 days against the State as diligence and negligence. Burnett argues the motions to continue the omnibus hearing arose from discovery delays and mislabeled video evidence provided by the State, implicitly attributing bad faith to the State's actions. However, the District Court's conclusion noted the complexity and volume of the evidence, and the record establishes the State's efforts to provide discovery in a timely manner. Moreover, "[d]istrict courts have the discretionary power to control discovery activities in cases pending before them." *State v. Burns*, 253 Mont. 37, 42, 830 P.2d 1318, 1322 (1992). Nothing in Burnett's filings led the District Court to take issue with the State's discovery efforts, nor did Burnett raise any complaints with the duration of discovery. To the contrary, Burnett's August 1, 2018, motion to continue the omnibus hearing acknowledged the voluminous nature of the evidence and stated the belief that the State had endeavored in good faith to provide the discovery, despite the technical difficulties that arose. The District Court correctly

[4] The District Court erroneously totaled these delays as 328 days and 141 days, respectively, but correctly calculated the total number of days as 466.

attributed the first period of delay to the State and correctly classified the reason as institutional delay, weighing least heavily against the State.

Second delay: 140 days (March 18, 2019 to August 5, 2019)

¶25 The District Court deemed the second delay of 140 days as institutional due to the breakdown of good faith plea agreement negotiations, the availability of counsel, and the court's existing trial calendar. Burnett contends the State's delay and failure to investigate during plea negotiations constituted a lack of diligence and thus should be weighed more heavily against the State. The record fails to support these contentions.

¶26 The parties agree the State made a plea offer in October 2018 and negotiations continued through March 2019. The record is devoid of bad faith by the State in these negotiations. Unlike in *State v. Small*, where the State argued plea negotiations relieved it of the duty to bring defendants to trial in a timely manner, the State advances no such proposition here. 279 Mont. 113, 118, 926 P.2d 1376, 1379 (1996). Moreover, again contrary to *Small*, where the State "relied on a proposed agreement which never came to fruition, and simply allowed the case to rest for in excess of 270 days[,]" 279 Mont. at 119, 926 P.2d at 1379, once it became clear Burnett would not enter into a plea agreement, the State moved forward with the case and resumed its review of the evidence. Further, the very nature of plea negotiations would have been undermined had the State continued investigating and charged the additional counts that arose after negotiations fell apart. The District Court noted this in its findings of fact when it found that the State agreed not to charge these additional counts. The State possessed a reasonable belief the case would settle, and the District Court properly relied on this belief in determining the 140-day delay

was institutional in nature. The District Court correctly concluded the 140-day delay was institutional in nature and weighed least heavily against the State.

Summary of the delay

¶27 The District Court attributed the entire 466-day delay to the State, concluding the delays were inherent to the criminal justice system and thus institutional in nature and weighed least heavily in the balancing test. Based on the record, we cannot say the District Court erred.

Factor Three: the accused's responses to the delay

¶28 Under Factor Three, we evaluate the accused's responses to the delay. *Couture*, ¶ 50. The issue is not simply the number of times the accused acquiesced or objected, but rather, the surrounding circumstances, including the following: whether the accused asserted their speedy trial right; the timeliness, persistence, and sincerity of their objections to delay; the reasons for any acquiescence; whether the accused was represented by counsel; and the accused's pretrial conduct as it relates to their speedy trial right. *Zimmerman*, ¶ 22. The totality of the accused's responses to the delay is indicative of whether they actually wanted a speedy trial and provides guidance for balancing the other factors. *Couture*, ¶ 50. Thus, the primary purpose of Factor Three remains the assessment of "whether the accused actually wanted to be brought to trial promptly." *Ariegwe*, ¶ 76.

¶29 However, courts may not infer the accused did not want a speedy trial solely because they failed to object to pretrial delay. *Ariegwe*, ¶ 82. Such an inference conflicts with two principles: first, the accused has no obligation to further prosecution of the case against them and has no duty to bring themselves to trial; and second, courts should not presume

acquiescence in the loss of fundamental rights. *Zimmerman*, ¶ 24. "Thus, failure to object to pretrial delay does not, by itself, establish that the accused did not want a speedy trial or that the speedy trial right has not been violated." *Zimmerman*, ¶ 24.

¶30 The District Court concluded that Burnett's failure to object to the State's motions to continue evinced a lack of desire for a speedy trial. This alone provides insufficient evidence of Burnett's desire for a speedy trial. *See Ariegwe*, ¶ 82. However, the District Court also found Burnett moved for continuances three times and concluded that Burnett's counsel's unavailability factored into Burnett's second trial setting. The record supports these findings. Burnett first asserted her right to a speedy trial eleven days after her arrest and two days after bonding out. Three weeks later, Burnett filed her first motion to continue the omnibus hearing, noting the time necessary to review the voluminous evidence. One month later, Burnett filed an identical motion to continue the omnibus hearing, citing the same reasons. Burnett's third motion to continue mentions the videos were mislabeled, but ascribes technical difficulties, not bad faith, to this mishap. Nor does the record support Burnett's implicit argument of bad faith by the State.

¶31 Burnett sent an *ex parte* communication to the District Court in November 2018, expressing her frustration toward counsel and toward being unable to review the evidence with her bail conditions. However, this communication does not take issue with the duration of the proceedings against her. After this letter, Burnett substituted counsel, necessitating additional time to review the evidence. As the District Court noted, Burnett failed to object to the State's motion to continue the trial. The District Court's findings

were supported by substantial evidence, and the District Court correctly concluded Factor Three weighed against Burnett.

Factor Four: prejudice to the accused

¶32 Under Factor Four, we assess whether the accused has been prejudiced by delay considering the interests the speedy trial right protects: (i) preventing oppressive pretrial incarceration, (ii) minimizing anxiety and concern caused by the presence of unresolved criminal charges, and (iii) limiting the possibility of impairment to the defendant's ability to mount an effective defense. *Ariegwe*, ¶ 111. As noted, the further the delay stretches beyond the 200-day trigger, the defendant's burden of showing prejudice lessens and the State's burden of proving a lack of prejudice increases. *Stops*, ¶ 41.

i. Preventing oppressive pretrial incarceration

¶33 The first interest, preventing oppressive pretrial incarceration, reflects the core concern of the speedy trial guarantee: impairment of liberty. *Ariegwe*, ¶ 89. Whether pretrial incarceration was oppressive depends on the circumstances, including the duration of incarceration, the complexity of the charged offense, any misconduct by the accused directly related to his incarceration, and the conditions of incarceration. *Couture*, ¶ 56.

¶34 Burnett suffered minimal pretrial incarceration. Burnett bonded out nine days after her arrest. We have previously found incarceration durations of four days (*Stops*, ¶¶ 42, 46) and eight days (*State v. Stiegelman*, 2013 MT 153, ¶ 22, 370 Mont. 352, 302 P.3d 396) insufficient under this interest. The nine days Burnett spent in jail fails to rise to the level of oppressive pretrial incarceration.

¶35 On appeal, Burnett acknowledges the short duration of her incarceration, but contends the District Court failed to consider the impact of Burnett's bail conditions. Burnett argues the bail conditions caused her to lose her job and financial stability and negatively impacted her father. The impact on Burnett is the focus of our analysis under this factor. At the hearing, Burnett failed to connect these losses directly to her bail conditions. On appeal, Burnett has presented no evidence of oppressive pretrial incarceration, nor any evidence that her bail conditions prejudiced her. The District Court correctly weighed this interest against Burnett.

ii. Minimizing the accused's anxiety and concern

¶36 The speedy trial right aims to shorten the disruption of the defendant's life caused by arrest and unresolved criminal charges. *Ariegwe*, ¶ 97. We have recognized damage to the defendant's reputation, deprivation of employment, drain of financial resources, and the loss of associations as pertinent considerations under this interest. *Ariegwe*, ¶ 96. However, the primary question remains whether the delay in bringing the defendant to trial unduly prolonged the disruption or aggravated the anxiety and concern inherent in being accused of a crime. *State v. Rose*, 2009 MT 4, ¶ 75, 348 Mont. 291, 202 P.3d 749.

¶37 Burnett contends the District Court erred when it concluded her anxiety and concern were inherent to being accused of a crime. At the hearing on Burnett's motion to dismiss, Burnett testified that she was on medication for an anxiety diagnosis before the State brought charges. She testified about other pre-existing maladies, including posttraumatic stress disorder, chronic pain, bone shards, a pituitary gland tumor, and her weight loss. Burnett also stated that she lost her job and friends and was unable to see her children due

to the charges. She further leveled numerous unsupported allegations of misconduct, assault, and abuse toward previous defense counsel, Detective Cunningham, A.G. and N.G.'s father, and CFS as contributing to her anxiety and stress. Her father testified to his belief that Burnett's weight loss resulted from a combination of things and stated that Burnett was holding herself together despite the circumstances. The State argued Burnett's anxiety and concern was inherent to being accused with a crime and more likely attributable to years of involvement with CFS and the court system.

¶38 Burnett's testimony at the hearing on her motion to dismiss fails to connect any of her health issues directly to the charges against her, and her testimony that many of the conditions existed before the charges undercuts her argument. Burnett's inability to see her children after the charges could be equally attributable to the results of the DN proceeding rather than Burnett's bail conditions. Burnett further failed to provide anything other than broad, unsupported allegations that the bail conditions resulted in her employment loss.

¶39 Burnett failed to demonstrate the delay aggravated her anxiety beyond the level expected of a person accused of a crime. Based on the testimony presented, the District Court correctly concluded Burnett's anxiety and concern was that inherent to being accused of a crime.

iii. Limiting the possibility the defense will be impaired

¶40 The third interest considers issues of evidence, witness reliability, and the accused's ability to present an effective defense. *Zimmerman*, ¶ 35. Impairment of the defense from a speedy trial violation constitutes the most important interest in our prejudice analysis.

Stiegelman, ¶ 29. Accordingly, we have noted the difficulty of identifying erosion of evidence and testimony under this interest and recognized that the accused's failure to make an affirmative showing under this interest does not prove fatal to a finding of impairment to the defense. *Rose*, ¶ 79; *State v. Billman*, 2008 MT 326, ¶ 47, 346 Mont. 118, 194 P.3d 58. However, in *Rose*, we noted the defendant's access to counsel and investigators and ability to assist in his defense as pertinent to concluding Rose's defense was not impaired by delay. *Rose*, ¶ 81. We further noted the absence of support for Rose's contentions that witnesses could not be located, or testimony was lost due to delay. *Rose*, ¶ 82. Absent affirmative proof of impairment, impairment must be assessed based on the other factors of our speedy trial analysis. *State v. Sartain*, 2010 MT 213, ¶ 25, 357 Mont. 483, 241 P.3d 1032.

¶41 As noted, the 466-day delay increases the State's burden of demonstrating Burnett was not prejudiced and correspondingly lowers Burnett's burden to prove specific prejudice. Nonetheless, Burnett failed to present any evidence of impairment related to her ability to raise specific defenses, elicit specific testimony, or produce specific evidence to the District Court. In weighing this interest against Burnett, the District Court noted the core evidence came from memorialized surveillance footage. At trial, Burnett took the stand to testify on her own behalf, but otherwise presented no witnesses. Burnett's defense was that her actions were typical, permissible disciplinary actions. She did not contest the accuracy of the surveillance footage or the incidents but instead characterized them as a misunderstanding.

¶42 It remains true that a defendant's failure to make an affirmative showing does not prove fatal to a finding of impairment. *See Billman*, ¶ 47. However, Burnett fails to identify any evidence or witness issues arising from the delay. Her defense at trial relied on no other witnesses nor any exculpatory evidence. Conversely, the State made the requisite strong showing that Burnett was not prejudiced. As in *Rose*, Burnett had access to two different lawyers and was able to consult, advise, and assist in preparation for trial and defense strategy. *See Rose*, ¶ 81. Based on the record before us, we cannot say Burnett's defense was impaired by the delay. The District Court correctly weighed this interest against Burnett.

Balancing

¶43 We determine whether the accused has been deprived of their right to a speedy trial by balancing each of the foregoing factors. *Ariegwe*, ¶ 112. Here, the pretrial delay under Factor One was lengthy, totaling 266 days beyond the 200-day trigger date. This factor weighs in favor of Burnett. The delay arose from institutional delay. We have recognized "though institutional delay constitutes the majority of pretrial delay, it nonetheless weighs against the State." *Billman*, ¶ 51. Burnett's responses under Factor Three failed to demonstrate "whether the accused actually wanted to be brought to trial promptly" and weighs against her. *See Ariegwe*, ¶ 76. We balance the delay with the limited pretrial incarceration of nine days that Burnett suffered under Factor Four. *See Stiegelman*, ¶ 29. Burnett failed to demonstrate that the delay aggravated her anxiety beyond that of a person accused of a crime. Finally, Burnett failed to make an affirmative showing of impairment to her defense, while the State satisfied its burden of proving lack of prejudice. On balance,

these considerations compel us to agree with the District Court's conclusion that the State did not violate Burnett's right to a speedy trial.

¶44 *2. Whether sufficient evidence existed to support Burnett's conviction for perjury.*

¶45 A person commits perjury if, in any official proceeding, the person knowingly makes a false statement under oath and does not retract that statement in the course of the proceeding before it became manifest the falsification was or would be exposed and before the falsification substantially affected the proceeding. Sections 45-7-201(1), (5), MCA. A false statement is material, regardless of admissibility under the rules of evidence, "if it could have affected the course or outcome of the proceeding. It is no defense that the declarant mistakenly believed the falsification to be immaterial. Whether a falsification is material in a given factual situation is a question of law." Section 45-7-201(3), MCA. A person may not be convicted of perjury when proof of falsity rests solely upon the testimony of one person other than the defendant. Section 45-7-201(7), MCA.

¶46 Burnett presents several theories to support her argument that insufficient evidence existed to support her perjury conviction, only two of which merit further analysis. Burnett first contends the testimony of Conlan was uncorroborated and, absent corroborating circumstances, the State failed to meet its burden.[5]

[5] Burnett additionally maintains her perjury conviction arose from "cautious" responses to imprecise questioning and that Burnett failed to understand the questions. In so doing, Burnett conflates her trial testimony with her testimony at the DN proceeding, which provided the basis for the perjury charge. Moreover, Burnett argues, without authority, that the prosecutor remains responsible for clarifying ambiguous statements and ensuring the defendant understands the questions. This argument is beside the point. First, we would not impose upon the State the burden to clarify defense counsel's questions to his client. More importantly, Burnett's unequivocal negative responses to direct questions from defense counsel during the DN proceeding—"Did you

¶47 On direct examination at the DN proceeding, Burnett unequivocally responded "No" to the following questions:

> Did you use a taser on the children?
>
> Did you make a statement that you had used a taser on the children?
>
> Did you ever press a taser against one of your children?
>
> Did you ever threaten any of the children with a taser?
>
> Did you make any statement on the jail phones that you had threatened the children with a taser?

The materiality of this testimony is evident because whether Burnett used or pressed a taser against N.G. could have had a direct impact on the outcome of the DN proceeding. On the jail phone call, Burnett admitted pressing the taser against N.G., contradicting her testimony at the DN proceeding. At trial, Conlan testified to witnessing Burnett press the taser on N.G. The State introduced the recording of Burnett's jail phone call, corroborating Conlan's testimony. Burnett admitted to pressing the flashlight part of the taser on N.G., further corroborating Conlan's testimony that he witnessed Burnett press the taser against N.G. The District Court's determination that Burnett committed perjury was not based solely on her testimony at the DN proceeding.

¶48 Burnett further argues her acquittal on Count I effectively establishes she could not have knowingly made a false statement. This contention misses the mark and confuses the elements of the offenses. A fundamental difference exists between the District Court

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ever use a taser on the children? . . . Did you ever press a taser against one of your children?"—rendered any need for clarification by the State unnecessary.

finding Burnett knowingly caused reasonable apprehension by pressing a taser to N.G. and finding Burnett knowingly testified falsely at the DN proceeding regarding whether she pressed a taser to N.G. The District Court noted its belief Burnett may have used a taser, but ultimately concluded the State failed to prove all elements of Count I beyond a reasonable doubt.[6] This conclusion is consonant with the District Court's conclusion Burnett perjured herself when she denied pressing the taser against N.G. at the DN proceeding.

¶49 The dissent asserts "using a taser on someone and pressing a taser to someone are not the same thing . . ." Dissent, ¶ 66. Several issues arise with this unsupported contention. First, it remains possible to "use" a taser by "pressing" it against someone. Stun devices, such as a taser, can be used by either firing two probes at a target or through a "drive stun." "In drive-stun mode, two electrodes in the front of the TASER are placed in direct contact with, or extremely close to, the target's skin. . . .[to] induc[e] pain rather than involuntary muscle contractions." *Eberhart v. Georgia*, 835 S.E. 2d 192, 194 n.3 (Ga. 2019). We do not view this as "dramatically different." Dissent, ¶ 66.

¶50 Second, the record fails to indicate anything more specific than Burnett's description of the taser. Burnett's description indicated "It has a red button and a black

[6] The dissent contends the District Court's conclusion, in conjunction with Burnett's acquittal, "could only mean the District Court believed the use of a taser on a seven-year-old girl did not cause her 'reasonable apprehension of bodily injury.'" Dissent, ¶ 71. District courts should provide adequate findings and conclusions to ensure this Court does not have to speculate as to the reasons for the district court's decisions. *Davis v. Jefferson Cty. Election Office*, 2018 MT 32, ¶ 24, 390 Mont. 280, 412 P.3d 1048. We are convinced of the adequacy of the District Court's findings and conclusions and decline to speculate beyond what the court specifically held as a basis for its acquittal on Count I. The District Court's findings and conclusions were sufficient.

button. On one end of the taser is a taser. The other end is a flashlight." This minimal description notably lacks any indication the device consisted of any handle, butt, or trigger to fire probes. Rather, Burnett's description supports the conclusion that the device at issue could be "used" by pressing a button and "pressing" it against someone. *See, e.g, Garcia v. Dutchess Cty.*, 43 F. Supp. 3d 281, 291 (S.D.N.Y. 2014) ("When a taser is *used* in stun mode, an electrical current is sent to the muscles in the area against which the weapon is *pressed*. . . . Use of a taser in this manner serves a pain compliance purpose." (Emphasis added; internal quotations and citations omitted.)).

¶51 Third, in cases involving the use of a weapon, we make no distinction between pointing a weapon at someone and shooting someone. Indeed, we have forcefully rejected such arguments before. In *State v. Crabb*, Crabb contended he did not actually "use" his weapon when he pointed it at someone and argued "one does not 'use' a weapon unless it is fired or used as a club." 232 Mont. 170, 175, 756 P.2d 1120, 1124 (1988). We termed Crabb's argument "ludicrous" and affirmed his conviction. 232 Mont. at 175-76, 756 P.2d at 1124. We do not categorize the dissent's point as harshly, but simply note the distinction may not be as dramatic as contended.

¶52 We agree with the dissent that there either is, or is not, sufficient evidence to convict a defendant of a crime. Dissent, ¶ 65. However, the dissent accuses the Court of going "far beyond its role" in our analysis of Issue 2. Dissent, ¶ 66. Our role, however, is simply to ascertain whether, viewed in the light most favorable to the prosecution, a rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt.

Fleming, ¶ 12. Whether the evidence *could* have supported a different result, as the dissent concludes, proves irrelevant to our review. *See Weigand*, ¶ 7.

¶53 Viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the essential elements of perjury beyond a reasonable doubt based on Burnett's testimony at the DN hearing, the jail phone call between Burnett and her father, and trial testimony from Conlan and Burnett.

CONCLUSION

¶54 We recognize the breadth of prosecutorial discretion when deciding what charges to file against an accused, but note this discretion is not unfettered. Probable cause must exist for any charging decision, and our decision here does not condone carte blanche perjury charges. Sufficient evidence existed to support Burnett's conviction for perjury. Additionally, the District Court correctly denied Burnett's motion to dismiss due to a speedy trial violation. Burnett's conviction is affirmed.

Justice

We concur:

Chief Justice

Justices

Justice Ingrid Gustafson, concurring in part and dissenting in part.

¶55 I concur with the Court that Burnett's right to a speedy trial was not violated in this case. I dissent, however, from the Court's conclusion Burnett's felony perjury conviction was supported by sufficient evidence. I would hold there was insufficient evidence to convict Burnett of perjury and reverse her conviction on that charge.

¶56 "A person commits the offense of perjury if in any official proceeding the person knowingly makes a false statement under oath or equivalent affirmation or swears or affirms the truth of a statement previously made when the statement is material." Section 45-7-201(1), MCA. A false statement "is material, regardless of the admissibility of the statement under rules of evidence, if it could have affected the course or outcome of the proceeding. It is no defense that the declarant mistakenly believed the falsification to be immaterial. Whether a falsification is material in a given factual situation is a question of law." Section 45-7-201(3), MCA. "A person may not be guilty of an offense under this section if the person retracted the falsification in the course of the proceeding in which it was made before it became manifest that the falsification was or would be exposed and before the falsification substantially affected the proceeding." Section 45-7-201(5), MCA. "A person may not be convicted of an offense under this section when proof of falsity rests solely upon the testimony of a single person other than the defendant." Section 45-7-201(7), MCA.

¶57 In Count I of the Amended Information, Burnett was charged with felony assault on a minor for using a taser on N.G. As charged in the Amended Information, Count I alleged

Burnett "purposely or knowingly caused reasonable apprehension of bodily injury" in N.G. by use of the taser. In Count XVII of the Amended Information, Burnett was charged with felony perjury for "knowingly ma[king] a material false statement under oath" for denying using a taser on her children during a January 22, 2019 hearing in her abuse and neglect case. Following a bench trial in the District Court, Burnett was acquitted of the assault on a minor charge based on her use of a taser on one of her children, but convicted of perjury for claiming she did not use a taser on one of her children.

¶58 We review claims of insufficient evidence de novo. *State v. Bekemans*, 2013 MT 11, ¶ 18, 368 Mont. 235, 293 P.3d 843 (citing *State v. Swann*, 2007 MT 126, ¶ 19, 337 Mont. 326, 160 P.3d 511). "We review an appeal concerning evidentiary sufficiency to determine whether, when viewing the evidence in the light most favorable to the prosecution, a rational finder of fact could have found the required elements of the offense beyond a reasonable doubt." *State v. Finley*, 2011 MT 89, ¶ 18, 360 Mont. 173, 252 P.3d 199 (citing *State v. Gunderson*, 2010 MT 166, ¶ 58, 357 Mont. 142, 237 P.3d 74). We review a verdict to determine whether sufficient evidence exists to support the verdict, not whether the evidence could have supported a different result. *State v. Field*, 2005 MT 181, ¶ 15, 328 Mont. 26, 116 P.3d 813 (citations omitted).

¶59 In reviewing Burnett's conviction, we are tasked with determining, after our de novo review and when the evidence is viewed in the light most favorable to the prosecution, whether a rational trier of fact could have found the required elements of perjury beyond a reasonable doubt. Following my review of the record, I cannot find how a rational trier of

fact could conclude the State proved the required elements of perjury beyond a reasonable doubt.

¶60 When convicting Burnett of felony perjury, the District Court issued the following conclusion of law:

> The [c]ourt concludes that the State of Montana has met its burden of proof on Count XVII of the 1st Amended Information. The following statements made by [Burnett] under oath on January 22, 2019 are false:
>
> a. Denial that she pressed a taser against one of her children;
>
> b. Denial that she was aware of the video cameras in the home.

As the State concedes, Burnett's denial "that she was aware of the video cameras in the home" did not constitute any part of the basis for Count XVII of the Amended Information. "Conviction upon a charge not made would be sheer denial of due process." *De Jonge v. Oregon*, 299 U.S. 353, 362, 57 S. Ct. 255, 259 (1937). Clearly, the District Court's conclusion of law that Burnett committed perjury based on her denial of awareness of video cameras in the home is incorrect. This leaves only the District Court's conclusion that Burnett's "[d]enial that she pressed a taser against one of her children" at the January 22, 2019 DN hearing was a materially false statement made under oath for our review.

¶61 As Burnett's perjury conviction is based on her testimony at the January 22, 2019 DN hearing, we must begin with that testimony itself. On direct examination from her defense counsel, after being reminded by counsel of the possible risks of testifying during the DN proceeding with her criminal trial still pending and that she was under oath, Burnett testified:

[Q.] Let's start with the taser. Did you use a taser on the children?

A. No, sir.

Q. Did you make a statement that you had used a taser on the children?

A. No, sir.

Q. Did you ever press a taser against one of your children?

A. No, sir.

Q. Okay. Didn't do anything like that?

A. No. The -- my question is, no one asked and described the taser in court, what it looks like, or how it was described. I can describe that taser. It has a red button and a black button. On one end of the taser is a taser. The other end is a flashlight. No one thought to bring that up, so I would like to bring that up on the record.

Q. Okay. Did you ever threaten any of the children with a taser?

A. No.

Q. Did you make any statement on the jail phones that you had threatened the children with a taser?

A. No, sir.

Q. Okay. So all of that is not true --

A. Correct.

Q. -- is that correct? All right.

On cross-examination by the State, Burnett further testified:

Q. Okay. Isn't it true you told somebody that you put the taser up to your child, but you didn't pull the trigger?

A. In jail when you're being slandered all over the news, and you're --

Q. I asked you the question. The question is: Did you say that?

A. Talked to my father about it, yes, I did. But I was requesting about the news media, because nothing was informed to me, what was being said.

A few months after Burnett gave this testimony during the DN hearing, the State filed an Amended Information charging Burnett with felony perjury. The factual basis for the charge, as alleged by the State in the affidavit supporting the Amended Information, was that "[d]uring her testimony under oath at a hearing on January 22, 2019, the Defendant denied ever using the taser on her children. Moreover, she denied making a statement about the taser during a jail house call to her father (which is recorded and in evidence)."

¶62 During the August 5-6, 2019 bench trial, the District Court heard testimony from Nicholas Conlan, who, at the time of the taser incident, lived with Burnett and the children in Burnett's home. Conlan had installed security cameras throughout the home while living there. Regarding the taser, Conlan testified to the following during direct examination by the State:

Q. All right. Do you own a taser, Nicholas?

A. Yes, ma'am.

Q. And was there ever an incident in the home that involved a taser?

A. Yes, ma'am.

Q. Okay. And would you tell the Judge about that?

A. Your Honor, I -- we were eating dinner in the basement, because that's something that I like to do is sit down, you know, as a family unit. And I don't recall why Amber got irate with [N.G.] And she had asked me to go grab my taser. My inten[t]ions were that she was going to scare the child with the taser. And with there being a camera in the basement, she asked to bring

[N.G.] into my bedroom. And so, I followed her in there and she tased -- she grabbed [N.G.], threw her on the bed, and tased her for a three full seconds. And that may not seem like a long time. But: One. Two. Three. That's a very very long time in my mind for a little seven-year-old girl. At that point, I immediately grabbed the taser and I said, "That's enough." I waited for a couple days to go by when Amber wasn't around, and I pulled [N.G.] aside and I told her that this will never happen again, your mother is not going to tase you, and nor will she continue to abuse you -- or, I didn't say abuse -- she will no longer hurt you in the way that she has been. Because I, at that point, I was honestly oblivious of the -- what was going on with her in abusing the children at first. But I started puzzling it together towards the end. And I -- I didn't know what to do to get out of the situation or to save the children. Because I did write a letter to the school, hoping that they would contact me so that I could talk to the school, someone, to find out what should be done.

Q. Okay. And regarding the taser, did you have an opportunity to observe [N.G.]'s face while she was being tased?

A. She -- she was screaming bloody murder. And the sad thing was so was her brother on -- like, here's my room, you walk out and then there's -- it's quite a big living room, and I can hear him screaming for his sister. He wasn't saying anything, he was just screaming, you know, for his sister. And that's when I -- I -- it was enough.

Q. Was it obvious to you that [N.G.] was in pain when she was tased?

A. Yeah. I tested it on myself before I would go -- it was for my protection. And it definitely does hurt.

Q. Okay. When you tested it on yourself, was it just a quick –

A. Oh, yeah. It was just a quick for me. I couldn't handle any more than a half a second.

During cross-examination, Nicholas had the following exchange with Burnett's defense-counsel regarding the taser:

Q. All right. Where she -- your testimony is she tased her daughter for three seconds; is that correct?

A. Yes, sir.

Q. All right. Is there any kind of flashlight or anything on that?

A. There is a flashlight, yes, sir. And then, there's also the button that you use to tase.

Q. Okay. Is there video -- since there's a camera in your room, is there video of this incident?

A. No.

¶63 At trial, a recording of a jail house call between Burnett and her father, Christopher, was admitted into evidence during the testimony of Great Falls Police Department Detective Katie Cunningham. In relevant part, this call recorded the following conversation:

Christopher: The story is that, uh, you tased one of your kids, and [Nicholas] talked you down with your taser.

Burnett: I don't own a taser.

Christopher: Have you ever owned a tase gun?

Burnett: No, it was Nicholas's. Nicholas called the cops and the cops told Nicholas that he can punish my kids as he sees fit. He wanted to tase my children and I said no.

Christopher: So, it's going to be your word against his . . . you think that was video and audio recorded?

Burnett: Yes, 'cause I called you immediately after that and I said Nicholas wanted me to tase my daughter and I said no. I held it to her hand for a split-second, but I didn't hit the on button.

Detective Cunningham, who also reviewed the approximately "four or five months' worth of" security camera footage from inside Burnett's home as part of her investigation,

testified she never saw "any particular incident that I thought the taser was involved in." In addition, a transcript of Burnett's testimony during the January 22, 2019 DN hearing was also admitted into evidence at trial.

¶64 After the State rested, Burnett took the stand and testified in her defense. In relevant part, this testimony elicited the following exchanges between Burnett and her defense counsel:

Q. Okay. Now, let's -- was there a taser in your home?

A. There was a taser in my home.

Q. And who's taser was that?

A. Nicholas Conlan's[.]

Q. Okay. And did your children ever get ahold of that taser?

A. No.

Q. Okay. Did they ever play with it?

A. No.

Q. Okay. Did you ever press the taser against one of your children?

A. No.

Q. Did you ever press part of the taser device against one of your children?

A. Yes.

Q. Okay. Which part?

A. The flashlight.

Q. Why did you do it?

A. Nicholas threatened my family.

Q. Okay. So, why -- again, why are you pressing the taser against your daughter? Or the light, flashlight, let's put it that way. Why did you do it?

A. Because I was threatened. My family was threatened by Nicholas Conlan.

Q. Okay. And he threatened you and that forced you to do it?

A. Yes.

Q. How so?

A. Nicholas Conlan got really upset with my daughter for stealing something of his.

Q. Okay.

A. Nicholas called the cops on my child for stealing something.

Q. Okay. So how does this lead to you pressing the taser against your child?

A. Nicholas turned around and used me at a most vulnerable time when I was medicated in agony pain.

. . .

Q. Okay. Now, you saw your testimony from the earlier hearing, correct? Regarding the taser, correct?

A. Correct.

Q. You and I looked at it? Okay. We reviewed it today just before we put you on the stand, as well, correct?

A. Correct.

Q. All right. Is -- and you understand what you said at those times, correct?

A. Yes.

Q. Were you intending to deceive anybody in answering those questions?

A. No.

Q. Okay. And when people were asking you if you had tased your daughter or used a taser on her, what were you thinking they were asking you?

A. That I took a[n] actual taser, without any description, without anything, misunderstandings, and no one asked questions.

Q. No. I'm asking you did you think they were -- what exactly were they asking you? What were you thinking they –

A. -- oh, that I actually took a taser and pressed it against my child.

Q. Okay. And discharged it?

A. Yes.

On Burnett's cross-examination by the State, the following relevant exchanges occurred:

Q. Okay. And let's, while we're on that topic, talk about things we're hearing for the first time today. Did -- you said that your family was threatened by Nicholas Conlan. And so, as a result of you being threatened by Nicholas, you held, now the flashlight end of a taser, to her?

A. I came to the Police Department with my children seeking help.

Q. No, I'm asking about the taser to your daughter.

A. Oh. To my daughter before that happened? I came to your Police Department asking for help to get him out of my house. I went to Bolstad and asked him to get him out of my house. You all said nothing.

Q. No. Ms. Burnett, I -- I'll ask the question one more time. As a result of feeling threatened, you held a taser to your daughter?

A. Yes.

Q. And what were you hoping to accomplish?

A. Making sure he didn't do it.

Q. And so you certainly understand how holding a taser to a seven or eight-year-old child would cause them fear.

A. Yes, I do.

. . .

Q. And so, today is the first time we've ever heard of any of these concerns, or Nick threatening you, or explanations for why you might have done the taser incident. Is that accurate?

A. Yes.

Q. Okay. And you say it was a misunderstanding, it was the flashlight end of the taser. You certainly didn't say that during the jail call with your father when he was shocked that you held it to her, did you?

A. No, I did not. But there was a lot of phone calls made between me and my father.

Q. Okay. Ms. Burnett, you understand you're under oath?

A. Yes, I do.

Q. At any time during any of those phone calls, did you indicate it was the flashlight end of that taser?

A. Yes, I did.

Q. You realize that those are in evidence?

A. Yes, because my father brought it to my attention.

Q. Okay.

A. And I said it was a flashlight.

Q. All right. At any time during your testimony under oath, did you indicate that you held the flashlight end of the taser to [N.G.]?

A. Did I indicate it? No, I did not.

Q. Okay. You actually denied the taser incident.

A. Yes, because it didn't happen. You all are sitting here questioning me: Did I tase my child? You're sitting here asking me -- drilling me like many others after I was arrested. Sworn testimony of Nicholas Conlan that I tased my child.

Q. Actually, the question, Amber, was: Did you ever press a taser against one of your children?

A. No, I did not.

Q. You never held the flashlight end to the child?

A. Holding it and acting on it is different.

Q. And you were asked: "Did you ever threaten any of the children with the taser?" To which you responded: "No."

A. Exactly.

Q. "Did you make any statements on the jail phone calls that you threatened the children with a taser?" And you said: "No."

A. Correct.

Q. So which is it?

A. I didn't tell my kids what it was. They didn't know what it was from me.

¶65 In reviewing the testimony and evidence admitted at trial, I cannot conclude sufficient evidence was presented to support Burnett's felony perjury conviction. There either is, or is not, sufficient evidence to convict a defendant of a crime. *State v. Azure*, 2008 MT 211, ¶ 13, 344 Mont. 188, 186 P.3d 1269. While, upon review of an insufficient evidence claim, we view the evidence presented in the light most favorable to the

prosecution, *Finley*, ¶ 18, our review is necessarily confined to the actual evidence presented at trial. Here, there is not sufficient evidence to maintain a perjury conviction for several reasons.

¶66 First, as charged, the State alleged Burnett "denied ever using the taser on her children" during the January 22, 2019 DN hearing. The District Court did not conclude Burnett denied using the taser on her child but rather concluded, contrary to the charging allegations, that she denied pressing a taser to her child. In its December 24, 2019 Amended Findings of Fact, Conclusions of Law, and Judgment, the District Court concluded Burnett committed felony perjury due to her "[d]enial that she pressed a taser against one of her children." Denial of using a taser on as opposed to pressing a taser but not using it on another are dramatically different denials.[1] During the DN hearing, Burnett was variously asked by her counsel and counsel for the State whether she had "used a taser on the children," "press[ed] a taser against" one of the children, "threatened" the children with a taser, or "put the taser up to" one of the children. Again, using a taser on someone

[1] While the Opinion provides a lengthy discussion about different features of various stun devices blanketly stating they can be used by either firing two probes or through a "drive stun" mode, it conveniently fails to recognize that the trigger mechanism must be deployed to actually tase someone in either mode. It is clear from Burnett's description that the flashlight/taser device at issue here had a red button and a black button indicating the need to press a button to engage either the taser or the flashlight. Again, the perjury charge asserts Burnett knowingly made a material false statement under oath denying using a taser on her children during a January 22, 2019 hearing in her abuse and neglect case. The charge requires analysis of Burnett's understanding of what constitutes using a taser on another. From her testimony it is clear she perceived there to be a difference in pressing the flashlight end of a flashlight/taser device against another and using a taser to employ an electrical shock on another.

and pressing a taser to someone are not the same thing,[2] and Burnett's testimony throughout her criminal trial repeatedly attempted to make this distinction as she was variously asked by her counsel and counsel for the State whether she had "press[ed] the taser" to her child, "press[ed] part of the taser device" to her child, "tased" her child, "used a taser" on her child, "held . . . the flashlight end of a taser" to her child, "held a taser" to her child, or "threatened the children with a taser." Based on the District Court's conclusions of law, Burnett was convicted for her denial "that she pressed a taser against" N.G. Accordingly, only those questions which specifically involve pressing a taser against N.G. are relevant to our inquiry today. The Court strays from this mandate by concluding Burnett's negative response to questions regarding "using" a taser on or "threatening" the children with a taser are material to her perjury conviction. Opinion, ¶ 47. While the Court may "probe the

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[2] The Court calls this contention "unsupported," declares some tasers can be used by simply pressing them against a person, and goes on to assert Burnett's description of the taser "supports the conclusion that the device at issue could be 'used' by pressing a button **and** 'pressing' it against someone." Opinion, ¶¶ 49-50 (emphasis added). The record regarding how this specific taser is operated is clear. The taser was admitted into evidence during the trial. Both Burnett and the owner of the taser, Nicholas Conlan, testified the "taser" contained both a flashlight and a taser portion. Conlan, on cross-examination, testified:

> Q. All right. Is there any kind of flashlight or anything on that?
>
> A. There is a flashlight, yes, sir. **And then, there's also the button that you use to tase.** [(Emphasis added.)]

The actual record of this case, then, shows the taser in question requires a specific button to be pressed for it to be "use[d] to tase." Burnett never testified she pressed the activation button—she has consistently denied doing so. Pressing a non-activated part-taser, part-flashlight device against another is, then, not the same thing as using a taser with its electric currents activated to actually tase another.

record for evidence to support the fact-finder's determination," *State v. Dineen*, 2020 MT 193, ¶ 14, 400 Mont. 461, 469 P.3d 122, it goes far beyond its role today by determining statements given in response to questions regarding the *use* or *threatened use* of a taser somehow support that Burnett lied by denying *pressing* a taser against her child. The Opinion discounts the distinction between pressing a flashlight/taser device against someone and using a flashlight/taser device to employ an electrical shock on another by analogizing that in cases involving the use of a weapon, "we make no distinction between pointing the weapon at someone and shooting someone."[3] Opinion, ¶ 51. This analogy is more of an apples to oranges comparison. In *State v. Crabb*, 232 Mont. 170, 756 P.2d 1120 (1988), cited by the Opinion, Crabb was charged with a felony assault for purposefully or knowingly causing reasonable apprehension of serious bodily injury or death in another by pointing a loaded .44 magnum revolver at another from a distance of approximately six feet while verbally threatening to kill the other. *Crabb*, 232 Mont. at 175-76, 756 P.2d at 1124. Crabb did not assert he did not point the weapon at another but rather asserted he acted in self-defense when doing so. *Crabb* would be somewhat more analogous if Crabb had then also been charged with and convicted of committing perjury for asserting he did not actually shoot the victim—although here Burnett was not even convicted of the

[3] Recognition that, under the particular facts in *Crabb*, pointing a loaded .44 magnum revolver with an eight-inch barrel at another from a distance of approximately six feet and threatening to kill the other would reasonably cause apprehension of serious bodily injury in another, was not a carte blanche conclusion there is no distinction between pointing a gun at someone and shooting someone. Such a conclusion would not have been drawn had, for example, Crabb pointed a .22 caliber air pistol at another 3 blocks away.

underlying offense which she purportedly perjured herself by saying she did not do it. Crabb was not charged with perjury.[4] Perjury requires an individual to make a knowingly false material statement in any official proceeding under oath or equivalent affirmation. Section 45-7-201(1), MCA. By its nature, a perjury charge requires analysis of the defendant's perception as to the falsity of the statement. Here, it is clear Burnett perceived there to be a significant distinction between pressing a non-activated taser against another and actually tasing another by deploying an electric shock to another. In this case, there is no clear evidence Burnett believed pressing the flashlight portion of a flashlight/taser device against another was the equivalent of using the flashlight/taser device to employ an actual electrical charge on another.

¶67 In addition, the Court finds support from the testimony of Nicholas Conlan at trial, writing "Conlan testified to witnessing Burnett press the taser on N.G. The State introduced the recording of Burnett's jail phone call, corroborating Conlan's testimony. Burnett admitted to pressing the flashlight part of the taser on N.G., further corroborating Conlan's testimony that he witnessed Burnett press the taser against N.G." Opinion, ¶ 47. At trial, however, Conlan did not testify to witnessing Burnett *press* the taser on N.G. He testified to witnessing Burnett "tas[ing] [N.G.] for a three full seconds" and to N.G. "screaming bloody murder" from the pain of being tased. Neither the jail phone call nor Burnett's testimony at trial corroborate Conlan's testimony, as in both of them Burnett

[4] However, under the Opinion's reasoning, he could have been convicted of perjury for averring he did not actually shoot the victim.

states she pressed the taser (and/or flashlight end of the taser) against N.G., but that she did not use the taser, activate the taser, or actually tase N.G. Additionally, Conlan's testimony at trial was not found credible by the District Court, as Burnett was acquitted of the assault on a minor charged based on her using the taser on N.G. "[T]he credibility of witnesses is exclusively the province of the trier of fact and, in the event of conflicting evidence, it is within the province of the trier of fact to determine which will prevail." *State v. Kelley*, 2005 MT 200, ¶ 22, 328 Mont. 187, 119 P.3d 67 (citing *State v. Bailey*, 2003 MT 150, ¶ 13, 316 Mont. 211, 70 P.3d 1231). The District Court, sitting as the fact-finder in a bench trial, observed Conlan testify to Burnett "tas[ing]" N.G. for three full seconds and to N.G. screaming in pain from being tased, and rejected his version of events. It is not the role of this Court to later give credence to this rejected testimony to find support for a conviction. This is especially true in the case of perjury which has heightened evidentiary requirements as "[a] person may not be convicted of [perjury] when proof of falsity rests solely upon the testimony of a single person other than the defendant." Section 45-7-201(7), MCA. Without Conlan's testimony, there is no basis for a perjury conviction here.

¶68 Second, whether a false statement "is material in a given factual situation is a question of law." Section 45-7-201(3), MCA. "The test for materiality is whether in the actual factual situation involved, it would be reasonable to find that a witness' statement, if believed, could have altered the course or outcome of the proceeding." *State v. Trull*, 2006 MT 119, ¶ 19, 332 Mont. 233, 136 P.3d 551. Further, the perjury statutes provide a person "may not be guilty of an offense under this section if the person retracted the

falsification in the course of the proceeding in which it was made before it became manifest that the falsification was or would be exposed and before the falsification substantially affected the proceeding." Section 45-7-201(5), MCA. Regarding pressing a taser to N.G., which is what the District Court convicted Burnett of perjury for lying about under oath, we are left with one exchange between Burnett and her counsel during the January 22, 2019 DN hearing. Burnett's counsel asked her, "Did you ever press a taser against one of your children?" The Court claims she "unequivocally responded 'No'" to this question. Opinion, ¶ 47. This is an overstatement of what the transcript actually provides. In context, the full exchange states:

> Q. Did you ever press a taser against one of your children?
>
> A. No, sir.
>
> Q. Okay. Didn't do anything like that?
>
> A. No. The -- my question is, no one asked and described the taser in court, what it looks like, or how it was described. I can describe that taser. It has a red button and a black button. On one end of the taser is a taser. The other end is a flashlight. No one thought to bring that up, so I would like to bring that up on the record.

Far from being the "unequivocal" no that the Court presents, Burnett immediately raises the issue of the taser being both a taser and a flashlight, and her desire for the record to reflect that the "taser" was not just a taser. Neither her counsel nor counsel for the State in the DN proceeding asked the obvious follow-up question of whether Burnett had pressed the flashlight end of the taser to N.G., which she admitted to doing during her criminal trial. Counsel for the State asked no questions about whether Burnett *pressed* the taser on

N.G. at all. "It is the responsibility of the lawyer to probe; testimonial interrogation, and cross-examination in particular, is a probing, prying, pressing form of inquiry. If a witness evades, it is the lawyer's responsibility to recognize the evasion and to bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination." *Bronston v. United States*, 409 U.S. 352, 358-59, 93 S. Ct. 595, 600 (1973). A felony perjury conviction for a possibly evasive answer, when combined with Burnett's immediate attempt to clarify and with no relevant follow-up by counsel for either the State or the defendant, such as the one given in this case is a "drastic sanction" indeed. *Bronston*, 409 U.S. at 358, 93 S. Ct. at 600.

¶69 Finally, and this bears repeating, Burnett was acquitted of the underlying conduct related to her perjury conviction. The Court handwaves this away by simply stating Burnett's contention her acquittal on Count I means she could not have committed perjury by lying about the conduct she was charged with in Count I "misses the mark and confuses the elements of the offenses." Opinion, ¶ 48. The Court goes on to note a "fundamental difference exists between the District Court finding Burnett knowingly caused reasonable apprehension by pressing a taser to N.G. and finding Burnett knowingly testified falsely at the DN proceeding regarding whether she pressed a taser to N.G." Opinion, ¶ 48.

¶70 "A person commits the offense of assault on a minor if the person commits an offense under 45-5-201, and at the time of the offense, the victim is under 14 years of age and the offender is 18 years of age or older." Section 45-5-212(1), MCA. "A person commits the offense of assault if the person . . . purposely or knowingly causes reasonable

apprehension of bodily injury in another." Section 45-5-201(1)(d), MCA. Burnett was charged with assault on a minor for causing reasonable apprehension of bodily injury in N.G. by using a taser on her. She was acquitted of this charge. As I have already recounted, the District Court rejected Conlan's testimony that he witnessed Burnett "tas[ing] [N.G.] for a three full seconds" and heard N.G. "screaming bloody murder" from the pain of being tased. If Conlan's testimony was believed, Burnett clearly committed the offense of assault on a minor as charged in Count I of the Amended Information. It was not. As a basic logic problem, it is unbelievable to me that Burnett was convicted by the District Court of perjury for, as charged in the Amended Information, lying about using a taser on N.G., while at the same time she was acquitted of using a taser on N.G.

¶71 While the Court seems to put stock in the District Court's conclusion of law which stated, "[o]n Count I specifically, while the [c]ourt may believe that [Burnett] used a taser on N.G., the evidence presented at trial was insufficient to constitute proof beyond a reasonable doubt," as support for its perjury conclusion, *see* Opinion, ¶ 48, I find this statement simply reinforces why there is not sufficient evidence to convict Burnett of perjury. As a defendant is presumed to be innocent until proven guilty, the State has the burden of proving a defendant's guilt beyond a reasonable doubt. *State v. Akers*, 2017 MT 311, ¶ 14, 389 Mont. 531, 408 P.3d 142; *see also* § 46-16-204, MCA. For Count I, the use of the taser on N.G., the District Court did not find proof beyond a reasonable doubt. If the District Court actually believed Burnett used a taser on N.G., yet still acquitted her on the charge, it could only mean the District Court believed the use of a taser on a

seven-year-old girl did not cause her "reasonable apprehension of bodily injury."[5] Such a conclusion would be absurd, particularly when Burnett herself testified that actually using a taser on a child would cause fear in a child. We are left, then, with taking the District Court at its word, that while it "may believe" Burnett used a taser on N.G., "the evidence presented at trial was insufficient to constitute proof beyond a reasonable doubt." Perjury carries the exact same "beyond a reasonable doubt" standard of proof as assault on a minor. If the State could not prove Burnett used a taser on N.G. beyond a reasonable doubt, how could they prove Burnett lied about using a taser on N.G. beyond a reasonable doubt? Simply put, they could not—and they did not. Rather than being properly tried on the charge alleged by the State, denial of the use of the taser on N.G., Burnett was apparently convicted by the District Court of denying pressing the taser against N.G. during the January 22, 2019 DN hearing.[6] Such a post-trial charging language switch is improper. *See De Jonge*, 299 U.S. at 362, 57 S. Ct. at 259. As Burnett was acquitted of using the taser on N.G., she should also have been acquitted of lying about using the taser on N.G.

¶72 Burnett denied she tased her child. Burnett was found not guilty of tasing her child. It makes little to no sense that Burnett is then guilty of denying an offense which the State

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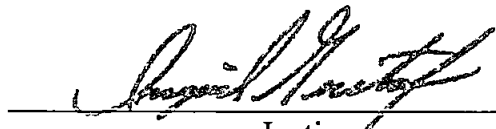
[5] The Court appears to believe this dissent is contending that the District Court found Burnett used a taser on N.G. but that it did not cause N.G. reasonable apprehension of bodily injury when it acquitted her. Opinion, ¶ 48 n.6. This is not the dissent's contention at all.

[6] The District Court also found Burnett guilty of the perjury charge finding she "Den[ied] that she was aware of the video cameras in the home"—an allegation for which she was not charged. From the record it is not clear whether this basis was thought by the District Court to be more compelling than Burnett's "[d]enial that she pressed a taser against one of her children," which the District Court also found as a basis for the perjury conviction.

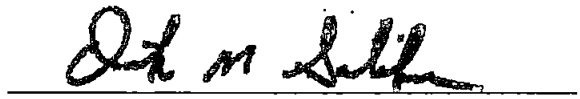
failed to prove occurred. I worry the Court upholding Burnett's conviction on this record wrongfully opens the door for prosecutors to charge perjury in nearly every case where a defendant generally denies the charges but is ultimately found guilty, and, at least in Burnett's case, even when the defendant is acquitted. I would hold the State did not present sufficient evidence to convict Burnett of perjury in this case. I dissent.



Justice

Chief Justice Mike McGrath and Justice Dirk Sandefur join in the concurring in part and dissenting in part Opinion of Justice Gustafson.

Chief Justice



Justice